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No.

IN THE

Supreme Court of the United States

OCTOBER TERM 1983

TRANSAMERICA COMPUTER COMPANY, INC.,
Petitioner,

v.

INTERNATIONAL BUSINESS MACHINES CORPORATION,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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August 1, 1983

QUESTIONS PRESENTED

I.

This Sherman Act section 2 case, in which predatory pricing is the pervasive issue, was tried to a jury. The jury was unable to reach a verdict. Pursuant to a pretrial stipulation made seven months earlier, the case was then submitted to the district court, which ruled for IBM.

On appeal, the Ninth Circuit rejected the cost-based predatory pricing "test" contained in the jury instructions. It held that the correct "test" was reflected in petitioner's proposed but repeatedly rejected instructions. Yet, the Ninth Circuit refused to reverse. Instead, it held that the disputed jury instructions were *irrelevant* on appeal, *inferring* that petitioner had waived its right to a properly instructed jury.

(a) Because, as this Court has said, a waiver of the right to trial by jury requires "express and intelligent" consent, did not the Ninth Circuit violate petitioner's seventh amendment rights by *inferring* that the pretrial stipulation was intended to waive a properly instructed jury?

(b) Can the Ninth Circuit's inference of waiver be upheld when the facts are that the parties fought hard over the right to a jury, submitted and argued about jury instructions, and were assured by the trial court that all objections were preserved? Can the Ninth Circuit constitutionally find a waiver of errors in then unknown jury instructions from a stipulation made seven months earlier that is silent on the point? Is the contemporaneous evidence of the parties' intent irrelevant, as the Ninth Circuit must have thought since it ignored it?

II.

Petitioner's case demonstrated why exclusive reliance on cost-based tests to prove predatory pricing is economically naive and condones anticompetitive conduct. The Ninth

Circuit agreed and held that predatory pricing could exist at prices above cost. That court's failure to reverse, notwithstanding the trial court's application of the wrong law on predatory pricing, raises these questions:

(a) Does not the fact that the district court *three times* denied IBM's motions for a directed verdict impeach the Ninth Circuit's refusal to reverse?

(b) Since, even after the jury deadlocked, the trial court, applying a pricing test more favorable to IBM than the correct test, *nowhere suggested* that IBM was entitled to judgment as a matter of law, can the Ninth Circuit properly act as a fact-finder and find otherwise?

(c) The district court concluded that IBM's predominant intent in taking the actions challenged here was "to preclude or delay . . . competition" but, applying a predatory pricing test which made intent irrelevant, excused IBM's conduct. Because the Ninth Circuit recognized the importance of intent in determining whether pricing *is* predatory, did it not depart radically from fundamental principles of appellate review by not reversing and remanding for further proceedings?

III.

Since the district court rejected petitioner's limit pricing instruction and later, in its decision, made no findings regarding IBM's intent in pricing, the Ninth Circuit could not rely on the "clearly erroneous" rule to affirm. Faced with this absence of findings on limit pricing, the Ninth Circuit, instead of remanding, first held that petitioner's burden of proof on the issue was not a preponderance of the evidence but "clear and convincing" proof. Having done so, it then weighed and interpreted the evidence and found that petitioner had not proven limit pricing by clear and convincing evidence.

(a) Is not the Ninth Circuit's "clear and convincing" burden in direct contravention of this Court's holding in *Herman & MacLean* v. *Huddleston*, 103 S. Ct. 683 (1983), that the burden of proof in both civil securities fraud and antitrust cases is a preponderance of the evidence?

(b) Since the limit pricing evidence in this record plainly permitted a jury to find for petitioner, did not the Ninth Circuit make *exactly* the same error that led this Court to reverse it in *Continental Ore Co.* v. *Union Carbide and Carbon Corp.*, 370 U.S. 690 (1962), holding that it is the jury, not the court of appeals, that "interprets" the evidence?

IV.

In pricing new products, IBM's financial procedures require the quantification of "impact"—the reduction in profits on existing leased products from the placement of new products performing similar functions. The trial court held as a matter of law that impact costs could not be included in determining whether a price is predatory. The Ninth Circuit disagreed. Nevertheless, the Ninth Circuit disregarded petitioner's impact evidence as "speculative." Since petitioner's evidence of impact and IBM's evidence of product profitability came from the very same IBM documents, and since the Ninth Circuit upheld IBM's profitability defense as not clearly erroneous, was it not plain error to characterize that same evidence as "speculative" when used to derive "impact costs"?

RULE 28.1 STATEMENT

Petitioner Transamerica Computer Company, Inc., which was renamed Transamerica Equipment Leasing Company, Inc., is a wholly-owned subsidiary of Transamerica Corporation. Petitioner has no subsidiaries. Transamerica Corporation's non-wholly owned subsidiaries are Compass Computer Services, Inc.; Chamberlaine & Flowers of Morgantown, Inc.; Wigham Poland Holdings Limited; Fred S. James Insurance Limited; Melia International Hotels, S.A.; Paladin Reinsurance Corporation; and Nevada Insurance Agency.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

OPINIONS BELOW

The opinion of the court of appeals is reported at 698 F.2d 1377. (App. A)[1] The opinion of the district court is reported at 481 F. Supp. 965. (App. B) Rulings on certain pretrial motions are reported at 459 F. Supp. 626. (App. C) An order clarifying certain of the pretrial rulings is unreported. (App. D) The order denying Transamerica's petition for rehearing and rejecting its suggestion for rehearing en banc is also not reported. (App. E)

[1] The appendix to this petition is a separate volume. Reference to the appendix is by the symbol "App." followed by a letter and page number.

JURISDICTION

The judgment of the court of appeals was entered on February 15, 1983. A timely petition for rehearing and rehearing en banc was denied on May 2, 1983. The jurisdiction of this Court is invoked under title 28, section 1254(1), of the United States Code.

STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED

Section 2 of the Sherman Act, 15 U.S.C. § 2, provides in pertinent part:

> Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony . . ..

Section 4 of the Clayton Act, 15 U.S.C. § 15, provides in pertinent part:

> (a) . . . [A]ny person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee.

The seventh amendment to the United States Constitution provides:

> In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.

STATEMENT OF THE CASE

A. The Parties

Transamerica Corporation, a company with experience in many diversified areas of business, recognized the growth potential of the computer industry and entered that industry through a subsidiary, Transamerica Computer Company, Inc., formed in 1967.[2] Transamerica identified young promising companies, purchased their products and leased them to computer users.

Most users during the period relevant to this case leased rather than purchased their computers. This lease orientation placed a heavy strain on any new entrant because it had to wait years to recover its costs before it could begin to show a profit. Unlike banks and other lenders supplying capital to these young companies, Transamerica, as a leasing company, bought the equipment from manufacturers and bore the risks of ownership. By so doing, it provided badly-needed capital for companies trying to break into these lease-oriented computer markets.

Transamerica was the first leasing company to specialize in peripheral devices plug-compatible with IBM computers. It purchased such devices from two of the first successful peripheral companies, Telex Corporation and Marshall Industries. After having committed over $200 million to the industry, Transamerica, like others large and small, found itself losing more and more in an industry that was growing each year. As a direct result of the IBM conduct described below, Transamerica cancelled its expansion plans and withdrew from the industry.

IBM is the dominant supplier of computer equipment. There is no part of the computer industry where IBM is not found. IBM's share of the markets involved here has never been below 65% and no single competitor has ever had as much

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[2] Transamerica Computer Company, Inc., is often referred to in this petition as "Transamerica"; the parent is always referred to as "Transamerica Corporation."

as 11%. (26 RT 2132-35, 2159-60)[3] IBM's success is explained in large part by the primary goal of the company: to maintain at any cost its dominant share of the markets. As its then-chairman put it in 1964:

> I think the main aim of this company must be to protect and expand our position in the market place and this must be a consideration well above that of profit.

(PX 980-R) IBM understands well that *market dominance* is the key to long range profitability. Following this policy of monopolization has proved effective for IBM. Its profitability over the years has been staggering. (PX 4623)

B. Computers and the Computer Industry

A computer "system" consists of interconnected devices ("hardware") and instructions ("software"). At the heart of a computer system is the central processing unit ("CPU") that performs the processing function. Attached to the CPU are devices called "peripherals" that perform the input, output, storage and control functions. The most commonly used peripherals are those involved in this case, disk drives and tape drives.

A disk drive stores data on round, phonograph record-like, stacked disks. A tape drive stores data on magnetic tape which runs between two reels mounted on the drive.

"Software" describes the sequence of written instructions which tell the computer system how to do a particular operation.

1. *General Purpose Systems Manufacturers*

The computer industry revolves around a handful of companies that manufacture and market "general purpose" computer systems, *i.e.*, systems designed to do a variety of tasks and capable of switching easily from one task to another. In

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[3] Citations to the reporter's transcript of the trial are cited as "RT" preceded by volume and followed by page number. References to transcripts of non-trial proceedings are cited by date and description of the proceeding, together with the page number. Citations to the clerk's record are cited as "CR" followed by the docket number and, where necessary, to the page number of the document. References to petitioner's exhibits are cited as "PX."

addition to IBM, general purpose systems are offered by Univac, Honeywell, Burroughs, Control Data, National Cash Register and Digital Equipment. Three other large companies—RCA, General Electric and Xerox—and several smaller ones at one time competed in the general purpose systems market but have since exited. There has been no new entry into the market by a full-line systems supplier since the early 1960s. (App. B at 19)

2. *Plug-Compatible Peripherals Manufacturers*

Until the late 1960s, a computer user obtained its entire system—CPU and peripherals—from the systems manufacturer. In 1967 companies began offering users of IBM systems peripherals that were "plug-compatible" with IBM CPUs. These plug-compatible manufacturers ("PCMs") got their start when Dupont Corporation asked Telex to replace the IBM tape drives it was using. Telex successfully did so and, recognizing a market opportunity, it and later other PCMs began manufacturing plug-compatible peripherals and offering them to users of IBM systems.

These companies were attracted to the market because IBM had over 70% of the systems installed and was exacting monopoly profits on its peripherals. The PCMs initially met with success—they were offering products equivalent or superior to IBM's products, and at much lower prices. (App. B at 4)

C. IBM and How It "Competed" Against the Emerging PCMs

By late 1969, IBM became concerned about the adequacy of its product development in light of the announcements by PCMs of higher performance, lower-priced disks and tapes. Following the Comptroller General's Report to Congress detailing the advantages of PCM products, the Bureau of the Budget required all federal agencies to explain why they were not reducing computer costs by using PCM peripherals.

As a result of these events, IBM formed the Peripherals Task Force to study PCMs and their products and recommend actions to contain emerging PCM competition. Even though PCMs had displaced fewer than 5% of the disk and tape drives

attached to IBM CPUs, IBM's Management Committee concluded that peripherals represented IBM's "number one challenge."

1. *The 2319A and 2319B*

IBM's September 1970 announcement of the 2319A (code named "Mallard") was the first of its several product/pricing actions directed at ruining PCMs. The 2319A was an artificial reconfiguration of a long planned design for attaching IBM's current line of disk drives (2314-types) to the first in a new series of CPUs. IBM cut price 27% on these 2319A disks (but not on its other 2314-type disks) and split the control device that connected them to the CPU so as to preclude PCM competition. (App. B at 62)

Mallard's contrived and discriminatory nature had been rejected by IBM's legal staff. The 2319A was neither motivated by nor did it achieve technological superiority over the long planned design. Indeed, a senior IBM development engineer and the head of the Peripherals Task Force called it a "three file kludge."[4] As the district court recognized, "IBM's predominant intent in adopting the Mallard design was undoubtedly to preclude or delay PCM competition and gain a competitive advantage." (*Id.*)

IBM's second disk action directed against the PCMs was its December 1970 announcement of the 2319B. While the 2319A was intended to preclude PCM disk attachment on IBM's new series of CPUs, the 2319B attacked the PCMs' attachment of 2314-type disk drives on IBM's existing series of CPUs. Following announcement of the 2319A, IBM formed another task force that produced new studies of Telex and Memorex which calculated their "floor prices," *i.e.*, the lowest price the PCMs could go to and still survive. (PX 3127-R at 5D-R; 40 RT 5208-20; PX 1503-R) IBM decided to "reannounce" some of its 2314s at a substantially lower price without reducing price across-the-board on all 2314s then on rent. To do so required a "new" product. IBM "created" one by simply removing some electronics from its standard control unit, housing them with

[4] "A system and especially a computer system made up of components that are poorly matched or were originally intended for some other use." Webster's New Collegiate Dictionary 631 (1981).

standard disk drives (thus changing the interface), renumbering the assemblage (2314B/2319B) and lowering price on the drives by 27%. (46 RT 6643-48; PX 1639-PR at 3; 40 RT 5200-07) The "new" product was functionally *identical* to the standard product. But as a result of the announcement, some IBM customers were renting 2314s for a high price and others for a low price. Meanwhile, because they had to price below IBM to place their products, the PCMs had to reprice all of their 2314s and were pushed to their floor price and below. (PX 1552-R; 64 RT 10877; PX 3727 at 4C, 5C, 6A)

2. *The "Aspen" and "Mandan" Tape Drives*

By late 1967, IBM recognized that PCMs were offering "technically superior" and "better performing" tape drives at lower prices, and that this was the result of IBM's technological complacency. (PX 2523 at 5-6). In 1968 IBM considered, but rejected, straight-forward price cuts on its newest tape product (the 2420); it wanted to "avoid head-on price competition." (PX 573) Instead, paralleling its disk strategy, IBM made insignificant changes to its 2420 tape drive, altered the interface, renumbered it as a 3420, and cut its price by 36%—a price it knew would have "potential legal exposure." (PX 618) This disguised price cut, announced in November 1970, was code named "Aspen."

In the same announcement, IBM also took action directed at PCMs' success in marketing an older but still popular tape drive (the 2401). IBM again considered and rejected a straight-forward price cut, and again engaged in product manipulation. This time it removed electronics from the 2401, altered the interface so that the drive would only attach to a reworked controller, and substantially cut the price. This "new" product ("Mandan") was functionally *identical* to the 2401 and represented no engineering benefit whatsoever. (49 RT 7441-48; 27 RT 2494-95; 120 RT 23477)

3. *IBM's Long-Term Leases (FTP)*

In early 1971, IBM studied the effects of its fall actions and confirmed that the PCMs had been hurt. The studies also showed that there would be fewer PCMs attempting entry into

the markets because IBM's fall actions made financing unavailable. But PCMs were still there, and IBM management was advised that PCMs might still capture 20% of the marketplace. IBM ordered new studies of the cash flow and viability of the two leading PCMs, Memorex and Telex, which showed that further price cuts would have a ruinous effect on both.

Despite other IBM studies showing that the PCMs would enjoy only limited success, and that IBM would continue to have a monopoly share of the peripherals markets, IBM's management directed immediate action to stop further inroads by the PCMs. (40 RT 5335; PX 773-PM; PX 2259; PX 860; PX 4284; PX 4285; PX 2279-PRM)

This was done (after straight price cuts were again rejected) with the implementation of Fixed Term Plan ("FTP"). FTP, announced in May 1971, consisted of one and two-year leases at 8% and 16% discounts, was offered only on those peripheral products where PCMs had made inroads, and included severe cancellation penalties. IBM's studies had shown that such leases would lock the PCMs out of the marketplace, force them to lower prices even further, and reduce PCM revenues to where they would be "dying companies."[5]

Although all previous IBM studies of long-term leases had rejected them for financial and legal reasons, IBM now justified FTP by concocting forecasts that warned that unless FTP were adopted, PCMs would drive IBM from the peripherals markets. (PX 416-R; PX 413-R; PX 807-R) FTP was presented to and approved by the Management Review Committee—IBM's three top decision-makers—yet no questions were asked as to whether there was a need for such drastic action, or what had become of the documented financial, manufacturing and marketing constraints of the PCMs to turn them, so suddenly, into Goliaths. (127 RT 24824-25, 24829, 24836-45; PX 638; PX 4328) The FTP forecasts were abandoned almost immediately after FTP was announced. (PX 868 at 32; PX 790-M at 7-9; PX 3055-P)

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[5] (PX 2692-M) The unmasked version of PX 2692, which was kept from the jury, succinctly states that, as a result of an IBM long-term lease plan, each PCM would become a "dying company."

IBM lost money (in the short term) with FTP. $102 million in profit in 1972 alone. (PX 434-R) But FTP was successful for IBM in the long term—the PCMs could not reestablish the price differential necessary for them to place any products without going broke and were locked out of the market.

Even these short-term revenue reductions, however, were unacceptable to IBM. Conforming to the pattern that led Congress to proscribe monopolization, IBM promptly exploited its CPU monopoly by *raising* prices on its CPUs just two months later. This price "balancing" neutralized the FTP discounts, with the two actions together amounting to a "wash." (PX 740-R)

4. *System 370 Models 115 and 125*

IBM's final step came two months after FTP. To prevent its CPU customers from using lower-priced PCM disks and tapes with two soon-to-be-announced CPUs, IBM intentionally *degraded* those machines. The CPUs were the System 370 Models 115 and 125.

The IBM engineer in charge of these CPUs was ordered to investigate redesigning them so as to remove the features that made possible the attachment of disks and tapes facing PCM competition. Although all engineers responsible for the CPUs resisted management's order, the features were removed from the design and the machines were degraded. The engineers even quantified for IBM management how many IBM machines would not be ordered if the degradation took place: the estimate showed a loss to IBM of $60 million per year. (57 RT 9256, 9270-72, 9275-76; 59 RT 9593-94; PX 1613-P; PX 521-P; PX 1719; PX 1725)

There were neither technical nor cost reasons for this redesign. The trial court found that IBM's motivation for the redesign was "primarily to preclude" PCM competition. (App. B at 66) These degraded machines precluded PCMs from attaching their disks and tapes. (*Id.*)

* * *

IBM, when faced with emerging PCM competition, had no answer in better technology. For years it had no competition

and it had become technologically complacent. Writing in the summer of 1971, the former head of IBM's San Jose plant charged with developing and manufacturing its disk drives, acknowledged that IBM's "policy to price way beyond a normal profit," coupled with its technological complacency, had both attracted competition and left IBM no ready technological way to deal with it. (PX 3848-M at 2) Unwilling to pay the price of its complacency, IBM resorted to the series of contrived product manipulations, discriminatory and predatory price cuts, and preemptive leases that maintained IBM's monopoly power.

The cumulative effect of IBM's ten-month campaign against the PCMs accomplished its purpose. As the court below said:

> Whether one characterizes IBM's actions as "meeting" competition or "precluding" competition, there is no doubt that IBM's strategy worked. Transamerica, along with fifteen out of seventeen companies involved with plug-compatible peripherals, left the market after suffering huge losses.

(App. A at 3)

D. Proceedings Below—In the District Court

Transamerica filed its complaint in late 1973, alleging IBM's monopolization and attempted monopolization of three computer markets. At roughly the same time, other companies filed similar actions. The cases were consolidated for pretrial and assigned to a single judge for trial.

When it was concluded that a common trial of all cases was impractical, plaintiffs began vying for position in line. Transamerica was to go to trial first but, faced with IBM's stonewall approach to discovery on its real costs and margins of profit or loss, its trial date was vacated when other plaintiffs indicated they would go to trial without such discovery.[6] Thus,

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[6] The history of petitioner's attempt to find out IBM's real costs and margins, found in various pretrial motions and hearings, is a lengthy and instructive one. *See, e.g.*, CR 176; CR 192-93; CR 265; CR 279-80; CR 806; October 28, 1975 Pretrial Hearing at 85-100; January 29, 1976 Pretrial Hearing at 301-16; March 8, 1976 Pretrial Hearing at 89-93; August 12-13, 1976 Pretrial Hearing; September 3, 1976 Pretrial Hearing at 5-8; September 30, 1976 Pretrial Hearing at 53-98; October 28, 1976 Pretrial Hearing; July 1, 1977 Pretrial Hearing; October 26, 1977 Pretrial Hearing at 3-34; February 17, 1978 Pretrial Hearing.

CalComp was tried first.[7] After granting IBM's motion for a directed verdict in *CalComp*, the single assignment judge excused himself from the remaining cases, which were then remanded to the transferor judges. The *Memorex* case was tried next, also resulting in a directed verdict for IBM.[8]

Transamerica's trial began on December 4, 1978. At the close of Transamerica's case-in-chief, IBM moved for a directed verdict on the market issues, the pricing and conduct issues, and damages, all of which were denied. At the close of the evidence, motions for directed verdict were again denied. The day before closing arguments were to begin, and after jury instructions were nearly settled, the Ninth Circuit's opinion affirming *CalComp* was received. The court delayed argument, denied renewed IBM motions, but made substantial revisions in the instructions.

The jurors were instructed that, with the exception of one product action where the instructions made it virtually impossible to find against IBM, the *only* relevant "conduct" issue was whether IBM's prices were above cost. The jury concluded that IBM possessed monopoly power in each of the markets alleged by petitioner.[9] But faced with erroneous instructions on conduct, the jury was unable to agree on whether IBM had violated section 2. After 11 days of deliberations, the jury was discharged and, under a pretrial stipulation made shortly before trial, the case was submitted to the court.

On October 18, 1979, the court filed its opinion in favor of IBM, judgment was entered and, after motions, a revised opinion was filed on December 20, 1979. The trial court applied the same cost-based test it gave to the jury and,

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[7] *See California Computer Products, Inc.* v. *IBM*, 613 F.2d 727 (9th Cir. 1979).

[8] *See Memorex Corp.* v. *IBM*, 636 F.2d 1188 (9th Cir. 1980), *cert. denied*, 452 U.S. 972 (1981) (a three paragraph *per curiam* affirmance based on *CalComp*).

[9] Each juror was given a set of interrogatories on each element of Transamerica's case. Question 1 asked whether IBM possessed monopoly power in each of the three markets alleged by Transamerica. (138 RT 26831-32) The jury's written reports of its progress establish that it had answered affirmatively each sub-part of Question 1. *See* 144 RT 27015; CR 955 at 1-15 (jury's communications with court contained in Transamerica's motion to amend and supplement court's opinion).

although it found that IBM intentionally used its market power to gain competitive advantages and preclude competition, (App. B at 62, 66) it excused IBM's conduct. In finding against petitioner, the district court weighed the evidence; it did *not* find for IBM as a matter of law.

E. Proceedings Below—In the Ninth Circuit

On appeal, the Ninth Circuit rejected the district court's exclusive cost-based test. But the court held that Transamerica was not entitled to correct jury instructions because "instructions given to the deadlocked jury are irrelevant to this appeal." (App. A at 4 n.1) This non-sequitur was based on the Ninth Circuit's treatment of the pretrial stipulation as a waiver of petitioner's right to a properly instructed jury. Having disposed of the erroneous jury instructions by ignoring them, the court next excused the district court's application of the wrong law on the main issue in an unprecedented and especially forgiving manner. It first increased Transamerica's burden of proof and then held that since CalComp had not proven predatory pricing, Transamerica had not either.

Thus, the Ninth Circuit held that the lower court had "applied an incorrect test in deciding whether such prices were predatory." (App. A at 8) The court stated the correct rule for predatory pricing as follows:

> Predatory pricing occurs when a company that controls a substantial market share lowers its prices to drive out competition so that it can charge monopoly prices, and reap monopoly profits, at a later time.

(App. A at 9) Transamerica had repeatedly asked for, but had been refused, a virtually identical instruction at trial. (CR 906 at 41; CR 913 at 10-14; CR 920 at 2-5) Since the incorrect pricing test pervaded the jury instructions, the case should have been promptly reversed and, ironically, *had IBM won a verdict* it would have been reversed. Instead, the Ninth Circuit formulated a new burden of proof in antitrust law by holding that

> if the challenged prices exceed average total cost, the plaintiff must prove by clear and convincing evidence—*i.e.*, that it is highly probably true—that the defendant's pricing policy was predatory.

(App. A at 15)

The district court had applied a predatory pricing test that made intent irrelevant. (App. B at 34-37) It made no findings on limit pricing. Thus, the Ninth Circuit could not utilize the clearly erroneous rule to affirm on limit pricing—the district court's opinion being silent on this. Instead, the Ninth Circuit went outside this record and, declaring that Transamerica's "evidence is indistinguishable from CalComp's," held that IBM did not engage in limit pricing. (App. A at 16-17 & n.19)

Transamerica's petition for rehearing and rehearing en banc was denied.

REASONS FOR GRANTING THE WRIT

I.

AFFIRMANCE OF THE JUDGMENT BELOW, DESPITE THE REJECTION OF THE DISTRICT COURT'S PREDATORY PRICING TEST, VIOLATES PETITIONER'S CONSTITUTIONAL RIGHT TO A PROPERLY INSTRUCTED JURY

The Ninth Circuit ignored prejudicially erroneous predatory pricing instructions by unconstitutionally *inferring* that Transamerica waived its right to a properly instructed jury. It said that the pretrial stipulation, which permitted the district court to decide the case if the jury deadlocked, rendered the instructions "irrelevant to this appeal." (App. A at 4 n.1) To infer such a waiver violates the seventh amendment.

This Court has characterized the civil jury trial as a fundamental feature of our system of federal jurisprudence. *Jacob* v. *City of New York*, 315 U.S. 752 (1942). Procedures that threaten to curtail that constitutional right are repeatedly rejected:

> Maintenance of the jury as a fact-finding body is of such importance and occupies so firm a place in our history

> and jurisprudence that any seeming curtailment of the right to a jury trial should be scrutinized with the utmost care.

Dimick v. *Schiedt*, 293 U.S. 474, 486 (1935).

A. The Constitutional Right to a Jury Requires a Properly Instructed Jury

This Court long ago emphasized the duty of the trial judge to instruct correctly on the applicable law. *Herron* v. *Southern Pacific Co.*, 283 U.S. 91, 95 (1931). The parties are entitled to have their theories of the case presented to the jury by proper instructions. *Blassingill* v. *Waterman Steamship Corp.*, 336 F.2d 367, 368-69 (9th Cir. 1964); *Wong* v. *Swier*, 267 F.2d 749, 761 (9th Cir. 1959). A failure to charge the jury correctly on the law applicable to a party's case is *presumptively* prejudicial and, in the absence of a clear showing to the contrary, requires reversal. *United States* v. *River Rouge Improvement Co.*, 269 U.S. 411, 421 (1926); *Davis* v. *Patrick*, 122 U.S. 138 (1887).

B. There Is a Strong Presumption Against the Waiver of a Jury Trial

Waivers of the right to trial by jury are not found unless they are made by "express and intelligent consent." *Patton* v. *United States*, 281 U.S. 276, 312 (1930), *disapproved on other grounds*, *Williams* v. *Florida*, 399 U.S. 78 (1970). Courts are required to "indulge every reasonable presumption against waiver," *Aetna Insurance Company* v. *Kennedy*, 301 U.S. 389, 393 (1937), and find no waiver in "doubtful" circumstances. *Heyman* v. *Kline*, 456 F.2d 123, 129 (2d Cir.), *cert. denied*, 409 U.S. 847 (1972); *Bruce* v. *Bohanon*, 436 F.2d 733 (10th Cir. 1970), *cert. denied sub nom. Marathon Oil Co.* v. *Bruce*, 403 U.S. 918 (1971).

The standard for determining whether a party has waived any of the essential elements of a jury trial, including proper instructions, is the same as for deciding if a party waived the right to any jury at all. *Patton*, 281 U.S. at 290.

C. There Was No Waiver Here

This record shows no waiver. Transamerica timely demanded a jury trial and successfully defended against IBM's motion to strike the jury. (CR 46, CR 87, CR 356, CR 364, CR 387, CR 398, CR 428) Later, during pretrial conferences, the trial judge and counsel discussed how a deadlocked jury could be avoided. (10 RT 9-10, October 20, 1978; 12 RT 18-30, November 17, 1978) After considering various proposals ranging from a less than unanimous verdict to special procedures designed to enhance the jury's understanding of the case, the parties could agree only to permit the district judge to decide the case if the jury deadlocked. The court stated the stipulation for the record.[10]

Nothing in the stipulation expressly waived the parties' right to proper jury instructions. Certainly a waiver would have to be *express* to excuse in December 1978 errors in then unknown instructions to be given seven months later. Any suggestion of a waiver is totally inconsistent with the conduct of the court and counsel after the stipulation. Jury instructions were submitted, objected to and settled. (CR 639, CR 640, CR 911, CR 912, CR 920) When the instructions had been settled, the parties were assured by the trial judge that their objections

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[10] So that the jury in this matter submitted shall consist of no more than twelve and no less than six.

In addition to that, the parties have stipulated that if after the adequate period has been given for deliberation and if it appears to the Court, after consultation with counsel and the jury, that it's unlikely that this jury can agree upon a verdict, that the matter will be submitted to the Court for its decision.

I might say in that regard that it would be my intention, it is presently my intention to submit to the jury a verdict in interrogatory form and in the event there has been jury agreement on some but not all of the matters submitted to them, I would find their findings on those matters to be very persuasive, but not necessarily binding in the Court's ultimate determination.

(16 RT 283-85) (December 4, 1978)

would be preserved.[11] To infer waiver despite this record violates Transamerica's seventh amendment rights—and common sense.

It is one thing to review the district court's opinion under bench trial standards *after* finding no reversible error in the jury trial. That would have been proper. It is a different matter entirely to ignore reversible error in the jury trial and to review the court's opinion as if there had been no jury trial entitlement.

Under the Ninth Circuit's theory of waiver, if the jury in an *antitrust* case is instructed on the federal *securities* laws and hangs, the erroneous instructions are "irrelevant" on appeal so long as the parties had previously agreed that the trial court could decide the case if the jury deadlocks. Under the Ninth Circuit's approach, the appellate court simply examines the securities law findings of the trial court, imagines how the antitrust laws might be applied to them, and then decides the appeal.

As the bench and bar struggle to accommodate modern complex litigation with our historic constitutional safeguards, innovations facilitating that accommodation warrant judicious treatment. It is obvious that Transamerica would have declined to stipulate had it been asked to waive errors in the hotly-contested jury instructions. Stipulations designed to save the courts and litigants time and unnecessary expense should be

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[11] On June 26, 1979, shortly before closing arguments were to begin and almost seven months after the hung jury stipulation was entered into, the instructions were settled and Judge Schnacke said the following to counsel:

> You are both aware that under the rules your basic right to object to instructions given or refused comes after the instructions have been given and at that point you will have a final opportunity to state your objections under the rules. I will not require you or expect you to restate objections that have heretofore been stated in explicit terms. You may either incorporate those or ignore them at that time without being deemed to have waived any objection to the instructions.
>
> I will assume that your last objections to the instructions heretofore filed prior to this draft encompassed your instructions objections. Any changes that I have made since that time will be considered to have been made over your objections. But any additional changes that are made, if there should be any, obviously should be dealt with by objection after the instructions are given, if any such you have.

(133 RT 25827-28)

encouraged: they should not be transformed into waivers of prized constitutional rights.

As this Court has expressly recognized, there are "[s]pecial and important reasons for the grant of certiorari" when lower courts "deprive litigants of their right to a jury determination." *Rogers* v. *Missouri Pacific Railroad Co.*, 352 U.S. 500, 510 (1957). Given the constitutionally-mandated presumption against waiver, the pretrial stipulation cannot fairly be construed as a waiver of Transamerica's right to proper instructions and appellate review of the instructions. It was an unconstitutional deprivation of Transamerica's rights for the Ninth Circuit to infer otherwise.

II.

THE LAW OF PREDATORY PRICING IS HOPELESSLY CONFUSED AND BADLY NEEDS THE ATTENTION OF THIS COURT

A. The Rulings of the Circuits on Predatory Pricing Conflict with and Undermine This Court's Section 2 Jurisprudence

CalComp and like cases, which controlled here, are wholly at variance with this Court's teachings on section 2, namely, that it is sustained monopoly power that is proscribed by section 2, not just immorality or "bad" acts.

The decision below, where even the application of the wrong law on the main issue was not enough to cause a reversal, is representative of a string of lower court section 2 cases that threaten to emasculate our anti-monopolization law. *See* Sullivan, *Monopolization: Corporate Strategy, The IBM Cases and the Transformation of the Law*, 60 Tex. L. Rev. 587, 617-37 (1982). These cases, *CalComp* and its progeny, would return section 2 to the early twentieth century "abuse theory" of monopolization that was first put to rest by Judge Hand's historic decision in *United States* v. *Aluminum Co. of America*, 148 F.2d 416 (2d Cir. 1945) ("*Alcoa*").

As *Alcoa* put it, once a firm's monopoly power is established, "the only question is whether it falls within the exception established in favor of those who do not seek, but cannot avoid,

the control of a market." 148 F.2d at 431. Denied the opportunity to hear *Alcoa* because of the lack of a quorum, this Court unequivocably endorsed it a year later in *American Tobacco Co.* v. *United States*, 328 U.S. 781 (1946). There, this Court held that conduct, however "honestly industrial," that has an exclusionary effect converts monopoly into proscribed monopolization. 328 U.S. at 813-14.

United States v. *Griffith*, 334 U.S. 100 (1948), and *Schine Chain Theatres, Inc.* v. *United States*, 334 U.S. 110 (1948), stand for the same proposition. In *Griffith*, this Court held that section 2 is violated when a "monopoly results as a consequence of a defendant's conduct or business arrangements." 334 U.S. at 105. Inasmuch as "monopoly power, whether lawfully or unlawfully acquired, may itself constitute an evil and stand condemned under § 2."

> [i]t follows a fortiori that the use of monopoly power, however lawfully acquired, to foreclose competition, to gain a competitive advantage, or to destroy a competitor, is unlawful.

Id. at 107.

In *Schine*, as here, defendant used long-term leases and defended them (as IBM does) on the basis that they were "accepted methods of doing business in the industry." 334 U.S. at 118. But this Court understood what preemptive leases could do to competition when used by a company with monopoly power:

> [I]t seems to us apparent that their use served to intensify the impact of Schine's monopoly power on its competitors.

Id.

Schine had also cut prices. Were Schine's price cuts a procompetitive response to competitors or the use of monopoly power? One cannot, this Court said, decide this in the abstract. Price cutting is "indeed a competitive practice" but "it may be used in violation of the act." *Id.* at 120.

> Thus it may be the instrument of monopoly power to eliminate competitors or to bring them to their knees. But

> since it is not unlawful *per se*, facts and circumstances must be adduced to show that it was in *purpose or effect* employed as an instrument of monopoly power.

Id. at 120-21 (emphasis added).

There was no hint by this Court in *Schine* that price cuts had to be "below cost." Yet the *very criteria* this Court said would determine whether the price cuts did or did not violate section 2, *i.e.*, the "purpose or effect," were ruled *irrelevant* under the court's instructions in this case because of *CalComp*.

That exclusionary conduct, whether or not otherwise reprehensible, violates section 2 was endorsed as clearly as it could be in *United States* v. *United Shoe Machinery Corp.*, 110 F. Supp. 295 (D. Mass. 1953), *aff'd per curiam*, 347 U.S. 521 (1954). Judge Wyzanski found that United had monopolized, for its monopoly power was "not attributable solely to" superior product or natural advantages but instead to "other barriers to competition, and those barriers *were erected by United's own business policies*." 110 F. Supp. at 343-44 (emphasis added). The "business policies" which preserved United's monopoly power were long-term leases, which, because of United's market dominance, represented the forbidden use of monopoly power.

> They are contracts, arrangements and policies which, instead of encouraging competition based on pure merit, further the dominance of a particular firm. In this sense, they are unnatural barriers; they unnecessarily exclude actual and potential competition; they restrict a free market.

Id. at 344-45.

United States v. *Grinnell Corp.*, 384 U.S. 563 (1966), and *Otter Tail Power Company* v. *United States*, 410 U.S. 366 (1973), complete the unbroken series of this Court's section 2 cases holding that monopoly power, not shocking "unreasonable" conduct, is what section 2 outlaws. Grinnell had, among other things, adopted "pricing practices that contained competitors." 384 U.S. at 576. Nothing was made of whether they were below cost. *Otter Tail* reaffirmed what was clear since

Griffith: leveraging monopoly power to gain competitive advantages is proscribed, no matter how lawful or legitimate the conduct may otherwise be.

Cases such as *CalComp* show no understanding of the enormous anticompetitive effects a permissive attitude toward dominant companies will engender. When confronted with the use of monopoly power to control markets, such cases confuse this prohibited use of power with the competition the Sherman Act was designed to foster. It is wholly irrelevant whether competition is excluded by prices below the monopolist's cost. Indeed, the fact that a monopolist can exclude competition by prices even above its costs underscores the enormity of its economic power.

B. The Circuits Are in Open and Direct Conflict

Since this Court last addressed section 2, the most lethal anticompetitive weapon a monopolist can use to destroy emerging or existing competition—pricing—has received much attention from the commentators and the lower courts. That attention has engendered only disarray and conflict in the circuits.

The Ninth Circuit was both one of the first circuits to embrace an exclusive cost-based test and one of the first to reject it. Other circuits have endorsed some form of cost-based rules, although they disagree on the weight to be given to cost-based evidence and the exceptions, if any, to a *per se* legal application of such rules.

By rejecting in this case the rule that all prices above cost are *per se* legal, the Ninth Circuit (as well as the Sixth Circuit[12]) is in direct conflict with the Second Circuit.[13] The

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[12] *Borden, Inc.* v. *F.T.C.*, 674 F.2d 498, 515 (6th Cir. 1982), *vacated and remanded*, 103 S. Ct. 2115 (1983); *Richter Concrete Corp.* v. *Hilltop Concrete Corp.*, 691 F.2d 818, 824 (6th Cir. 1982).

[13] *Northeastern Tel. Co.* v. *American Tel. & Tel. Co.*, 651 F.2d 76, 88 (2d Cir. 1981), *cert. denied*, 455 U.S. 943 (1982); *but see Broadway Delivery Corp.* v. *United Parcel Service, Inc.*, 651 F.2d 122, 131 (2d Cir.), *cert. denied*, 454 U.S. 968 (1981).

First,[14] Third,[15] Fourth,[16] Fifth,[17] Seventh,[18] Eighth,[19] and Tenth[20] Circuits are somewhere in between.

C. The Ninth Circuit's Imposition of an Extraordinary Burden of Proof in Predatory Pricing Cases—Clear and Convincing Evidence—Both Exacerbates the Conflict and Independently Requires Reversal by This Court.

The Ninth Circuit here correctly held that a monopolist's prices could be predatory even if above its costs. But its further holding—that an antitrust plaintiff must shoulder a "clear and convincing" burden of proof to prevail in such circumstances—merely adds to the confusion in the lower courts that now characterizes predatory pricing law.

The Ninth Circuit's engrafting of a "clear and convincing" burden of proof on the law of predatory pricing is directly contrary to this Court's recent holding in *Herman & MacLean* v. *Huddleston*, 103 S. Ct. 683 (1983). There this Court reversed a Fifth Circuit ruling that the burden of proof for securities fraud under rule 10b-5 was clear and convincing evidence rather than a preponderance. This Court noted that even though a rule 10b-5 defendant faced the opprobrium that may result from a finding of fraudulent conduct,

> [t]he interests of defendants in a securities case do not differ qualitatively from the interest of *defendants sued for violations of other federal statutes such as the antitrust or civil rights laws, for which proof by a preponderance of the evidence suffices.*

103 S. Ct. at 692 (emphasis added).

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[14] *Americana Industries, Inc.* v. *Wometco de Puerto Rico, Inc.*, 556 F.2d 625, 628 (1st Cir. 1977).

[15] *O. Hommel Co.* v. *Ferro Corp.*, 659 F.2d 340 (3d Cir. 1981), *cert. denied*, 455 U.S. 1017 (1982).

[16] *Greenville Publishing Co.* v. *Daily Reflector, Inc.*, 496 F.2d 391 (4th Cir. 1974).

[17] *International Air Industries, Inc.* v. *American Excelsior Co.*, 517 F.2d 714, 723-24 (5th Cir. 1975), *cert. denied*, 424 U.S. 943 (1976).

[18] *MCI Communications Corp.* v. *American Tel. & Tel. Co.*, 1982-83 Trade Cas. (CCH) ¶ 65,137 (7th Cir., Jan. 12, 1983). MCI's petition for a writ of certiorari raising the predatory pricing issue was filed with this Court on July 11, 1983.

[19] *Superturf, Inc.* v. *Monsanto Co.*, 660 F.2d 1275, 1281 (8th Cir. 1981).

[20] *Pacific Engineering & Production Co. of Nevada* v. *Kerr-McGee Corp.*, 551 F.2d 790 (10th Cir.), *cert. denied*, 434 U.S. 879 (1977).

Earlier decisions of this Court had made plain that the "clear and convincing" standard is reserved for the protection of individual interests that are particularly important and are "more substantial than mere loss of money." *Addington* v. *Texas*, 441 U.S. 418, 424 (1979); *California* v. *Mitchell Bros.' Santa Ana Theater*, 454 U.S. 90 (1981); *Santosky* v. *Kramer*, 455 U.S. 745 (1982). As the Second Circuit said, in recently holding that a preponderance of the evidence and *not* clear and convincing is the proper burden in an antitrust case, there is "no reason to impose any higher burden of proof" on an antitrust plaintiff. *Litton Systems, Inc.* v. *American Tel. & Tel. Co.*, 700 F.2d 785, 813 (2d Cir. 1983).

The Ninth Circuit's error in applying the stringent "clear and convincing" burden of proof to Transamerica's limit pricing case is bad law, and effectively neutralizes the Ninth Circuit's holding that prices above cost can be predatory.

D. The Presumed Objectivity and Easy Application of Cost-Based Rules Is Wholly Fanciful

"Cost" is an elusive concept. What it is and how it is defined depends in large part on why the information is needed and the time over which it is measured.[21] "Cost" in lease markets such as these is particularly uncertain, where revenues are received and costs are incurred over a period of years. Attempting to make cost-based tests a panacea for the resolution of complex and important antitrust issues will inevitably lead courts into the type of errors made by both lower courts here.

The products involved in this case were largely leased to users, not sold. Thus, the profitability of products on rent is adversely affected by the announcement of newer products performing similar functions, because users stop leasing the existing products and switch to the newer ones. IBM accounted for this reduction in profits on existing products and called it "impact." Impact, according to IBM's Financial Procedures Manual, is a "fundamental consideration" in the pricing of its products.

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[21] The accountants who testified at trial—for Transamerica and for IBM—agreed on this. (70 RT 11991; 101 RT 18817-23)

Transamerica's economic and accounting witnesses confirmed that impact is a cost and should be treated as such because it represented profit IBM expected to earn but intentionally gave up as a result of deciding to announce the later product. It is properly treated as a cost of that decision. Despite Transamerica's evidence that impact is a cost, and despite IBM's routine use of this pricing tool, the district court held as a matter of law that impact costs could not be included "in determining whether a price is predatory." (App. C at 7) The district court did not instruct the jury on impact and later failed to consider it when exonerating IBM's pricing decisions.[22]

The Ninth Circuit acknowledged that evidence of impact costs could be considered in determining whether prices are predatory (thus disagreeing with the district court) but characterized Transamerica's impact evidence as "speculative." (App. A at 8 n.3)[23] The Ninth Circuit's characterization appears to have been based on its mistaken conjecture that the foregone profits represented by impact "might never have been realized by IBM because of competition from the PCMs." (*Id.*)

IBM's pricing procedures demonstrate that the Ninth Circuit was wide of the mark. The "forecast assumptions," a key component in IBM's pricing procedures, regularly accounted for actual and expected competition, and Transamerica simply incorporated those calculations in its proof of IBM's real costs.

If the impact costs calculated by IBM and used by Transamerica were speculative, IBM's claim of profitability was equally speculative. The forecasts and financial analysis relied on by IBM to support its profitability defense are the *very same* documents that reveal the impact that petitioner sought to include as a cost.

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[22] The Ninth Circuit remarked that "Transamerica does not contend on appeal that it was precluded from introducing any evidence on impact cost." (App. A at 8 n.3) That is correct, as far as it goes. What the trial court refused to permit was any *use* by petitioner of impact costs *as costs*. Had the jury been properly instructed that impact costs are costs, it could have found that IBM's prices were predatory *even as restrictively defined by the district court*.

[23] The trial court had *not* held that impact evidence was speculative. It had admitted such evidence, but held that it could not be considered when calculating costs. *See, e.g.*, 73 RT 12567, 12579, 12650, 12666.

As noted in a recent law journal:

> The introduction of a new substitute product may be predatory if the revenues from its sales fail to exceed the incremental costs of its production plus the reduction in net revenues caused by the diversion of sales from the pre-existing products of the innovators.

Ordover and Willig, *An Economic Definition of Predation: Pricing and Product Innovation*, 91 Yale L.J. 8, 25-26 (1981). Turning directly to this case, the authors conclude that the district court's decision not to consider petitioner's evidence of impact costs

> is at variance with the economic analysis of tests for predatory product sacrifice presented in this article . . .. Impact costs would have been an important component of an economically sound test for predatory product innovations in the Transamerica litigation. . . . The ruling to exclude such costs was inconsistent with our view that exit-inducing profit sacrifice for the sake of future monopoly gain is predatory.

Id. at 26 n. 49.

III.

GIVEN THE TRIAL COURT'S REFUSAL TO INSTRUCT ON LIMIT PRICING AND ITS FAILURE TO MAKE LIMIT PRICING FINDINGS, THE NINTH CIRCUIT IMPROPERLY INVADED THE PROVINCE OF THE JURY BY "INTERPRETING" THE EVIDENCE ON LIMIT PRICING

The Ninth Circuit correctly held that

> [p]redatory pricing occurs when a company that controls a substantial market share lowers its prices to drive out competition so that it can charge monopoly prices, and reap monopoly profits, at a later time.

(App. A at 9) The court of appeals rejected the district court's ruling that prices above average total cost "should be conclusively presumed legal," (App. B at 37) and held that predatory pricing may be established even at prices above total cost. (App. A at 15) One predatory practice expressly identified by the court below, following its earlier decisions,[24] is limit

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[24] *William Inglis & Sons Baking Co. v. ITT Continental Banking Co., Inc.*, 668 F.2d 1014 (9th Cir. 1981), *cert. denied*, 103 S. Ct. 58 (1982); *D & S Redi-Mix v. Sierra Redi-Mix and Contracting Co.*, 692 F.2d 1245 (9th Cir. 1982).

pricing: pricing by which a seller foregoes short-term profits in order to develop a market position from which it can later raise prices and recoup lost profits. (App. A at 13)

Although Transamerica plainly proved limit pricing by IBM and repeatedly asked for instructions on this theory, the court refused to give them. The district court exacerbated the error by telling the jury that IBM's prices were "lawful" *either* if they were projected to be profitable (regardless of what was intended) *or if they turned out to be profitable.*[25] In these lease markets, how long a product remains in the market on rent is the key to its profitability. Thus, the more predatory and exclusionary IBM's conduct was, the more profitable its predatory products would become.

The "actual profits" instruction is antithetical to "limit pricing." Limit pricing—foregoing short-term profits for the purpose of market domination and later recoupment—is predatory pricing. Under the "actual profits" instruction, price cuts and later recoupment are *per se* lawful, regardless of purpose or effect.

Despite the district court's position on cost-based tests and limit pricing, the district court *three times* denied IBM's motions for directed verdict. Moreover, after the jury deadlocked and the district court ruled for IBM, it never intimated that IBM was entitled to judgment "as a matter of law." If the district court, as a fact-finder applying a predatory pricing test more favorable to IBM than the correct test, found Transamerica had sufficient evidence to go to the jury, the court of appeals cannot properly find otherwise.

In concluding that "Transamerica did not prove that IBM engaged in limit pricing," (App. A at 16) the Ninth Circuit could not rely upon the "clearly erroneous" rule—the district court had made no findings on limit pricing. Instead of remanding, the court of appeals, by reference to *CalComp*, *found* that petitioner had not proven limit pricing by clear and convincing evidence. In so doing, the court ignored both its own reasons for rejecting exclusive reliance on cost-based tests and the predation findings of the district court. It also repeated the error that caused this Court to reverse the Ninth Circuit in *Continental Ore Co.* v. *Union Carbide and Carbon Corp.*, 370 U.S. 690 (1962).

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[25] *See* 138 RT 26842-43.

Thus, the court rejected the cost-based rule applied by the district court, in part, because it "forecloses consideration of other important factors, such as intent . . .." (App. A at 14) But in speculating on whether Transamerica had proved a violation *not even considered by the district court*, the court of appeals overlooked the district court's view that intent is irrelevant when reviewing pricing conduct unless it is below cost. (App. B at 34-37)

Had the district court not viewed intent as irrelevant to pricing, a fact finder could easily have found that IBM's predominant intent "was undoubtedly to preclude or delay PCM competition . . .." (App. B at 62) This is exactly what the district court held with regard to the design aspect of IBM's first price cut, the 2319A disk drive. It also acknowledged that IBM knew that by announcing FTP, "PCMs would be kept at bay long enough for IBM to complete its development and introduction of improved products." (App. B at 68)[26] However, because of its erroneous reliance on a cost-based test, the district court ignored intent whenever the same conduct involved price action.[27]

Transamerica's evidence of limit pricing, according to the Ninth Circuit, was "indistinguishable from CalComp's." (App. A at 16-17 & n.19) Since neither trial court (not here, not in *CalComp*) made any finding on limit pricing, the statement suggests that the Ninth Circuit examined the *CalComp* record and compared it with this record. Transamerica's FTP case—the clearest example of limit pricing—impeaches the Ninth Circuit's "interpretation" of the evidence and makes clear that these were questions for the jury to decide, not the court of appeals.

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[26] The trial court also found that IBM was primarily motivated by predatory intent in its degradation of the System 370 Models 115 and 125 CPUs and *held* that IBM's degradation of the byte multiplexor feature was for the sole purpose and effect of precluding competition. (App. B at 67) This was no benevolent monopolist at work.

[27] The district court excluded some seventy IBM documents which bore directly on its intent. Transamerica appealed from those rulings, but the Ninth Circuit is silent on this matter despite its recognition of the importance of intent.

CalComp found, on the record there, that FTP was a reasonable response to competition. It did so in the stated belief that (1) absent FTP, PCMs would have taken 100 percent of IBM's peripherals business, (2) each product under FTP was "substantially profitable," (3) FTP leases were no different than PCM leases, (4) FTP was the least exclusionary alternative open to IBM, and (5) IBM's nearly-simultaneous CPU price increase did not offset the FTP profit giveups. *See California Computer Products, Inc.* v. *IBM*, 613 F.2d 727, 739-45 nn.17, 19, 22 (9th Cir. 1979). Transamerica's evidence demonstrated that *each* of these five beliefs was false.

Thus, for example, Transamerica introduced uncontradicted evidence that IBM knowingly rejected available and less exclusionary business alternatives in favor of FTP. This evidence had not been elicited at the time of the *CalComp* or *Memorex* trials and was not part of those records. The evidence came from the highest sources at IBM, its current and immediate past chairmen. Both unequivocally testified, contrary to IBM's litigation posturing, that when FTP was announced IBM had many other ways to compete against PCMs. (83 RT 14742-43; 127 RT 24789-90)

The *CalComp* court held that FTP was a "reasonable response to competition." 613 F.2d at 741-43. Transamerica's record showed that not only did IBM "unnecessarily exclude competition" with FTP but that IBM, using its monopoly power, deliberately chose the *most* exclusionary alternative available.[28]

The Ninth Circuit, in discussing limit pricing, relied on a statement by the district court that entry barriers in the peripheral markets were low. (App. A at 16 n.19) The

[28] Following *CalComp*, the court of appeals here applied an "unreasonably restricts" section 1 test to the "willful maintenance" issue in a section 2 case. The correct section 2 test, first stated in *United States* v. *United Shoe Machinery Corp.*, is whether defendant's conduct "unnecessarily excludes competition." The correct test was applied in the Ninth Circuit's decision in *Greyhound Computer Corporation, Inc.* v. *IBM*, 559 F.2d 488 (9th Cir. 1977), *cert. denied*, 434 U.S. 1040 (1978), and most recently by the Seventh Circuit on the conduct issue in *MCI Communications Corporation* v. *American Tel. & Tel. Co.*, ¶ 65,137 at 71,396.

evidence is directly to the contrary and the jury implicitly so found.[29] Although PCMs began competing with IBM before IBM's predatory pricing, it is obvious that IBM's conduct created insurmountable barriers to new entry. As the Ninth Circuit observed, IBM's deliberate barrier-creating conduct drove *fifteen of seventeen PCMs out of the market.* (App. A at 3) No new companies took their places.[30]

Finally, the Ninth Circuit's statement that "to be limiting . . . the price must generally be below competitors' prices," (App. A at 16 n.19) is at complete variance with the undisputed record here showing that for PCMs to obtain any business they had to offer equivalent or superior products at lower prices than IBM. (App. A at 2; App. B at 4, 24) The detailed viability studies IBM prepared of the PCMs before each of the price cuts revealed that IBM knew it need not lower its prices below those of the PCMs in order to force PCMs to their "floor" prices.

Transamerica offered substantial evidence from which the jury could have found limit pricing. It could not have been plainer. Each step in IBM's campaign against the PCMs was preceded by studies of their financial viability and vulnerability and of the level of price cuts by IBM necessary to drive the PCMs below their "floor" price. The results of those studies were then implemented. IBM priced its products knowing it

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[29] The jury found for Transamerica on the market issues.

[30] The Ninth Circuit's suggestion in footnote 19 of its opinion that because entry barriers were "low" before the IBM conduct which greatly raised those barriers, that same conduct cannot be limit pricing, is incorrect. A "limit" price is one set either to deter new entry or to contain the growth of existing competitors. *See, e.g.*, F. Scherer, *Industrial Market Structure and Economic Performance* 219-35 (1970); Note, Telex v. IBM: *Monopoly Pricing Under Section 2 of the Sherman Act*, 84 Yale L.J. 558 (1975).

would forego profits but increase its already dominant share at the expense of the PCMs.[31]

The Ninth Circuit did not say that had the jury been properly instructed, no reasonable jury could have found for Transamerica. Nor could it do so. Instead, the Ninth Circuit observed that "[o]n this record, IBM was entitled to judgment as a matter of law." (App. A at 17)

If the Ninth Circuit meant to say that it had applied a directed verdict standard to this case, it engaged in exactly the same departure from appellate review standards that led this Court to reverse it in *Continental Ore Co.* v. *Union Carbide and Carbon Corp.*, 370 U.S. 690 (1962). There, too, the Ninth Circuit stated it was reviewing an antitrust trial under a "correctness" test:

> If we conclude that the trial judge should have granted defendants' motion for a directed verdict, we should affirm the judgment as rendered, whatever errors appellants may convince us were made by the judge during the trial.

Continental Ore Co. v. *Union Carbide and Carbon Corp.*, 289 F.2d 86, 89 (9th Cir. 1961). But rather than following this test, the Ninth Circuit in fact weighed and interpreted the evidence. It then refused to review erroneous instructions and rulings and held the errors were irrelevant and the defendants entitled to directed verdicts (even though the case had gone to jury verdict).

This Court took pains to point out that the Ninth Circuit had improperly preempted the fact-finder and that

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[31] The Ninth Circuit, in "interpreting" the evidence, found there was no evidence of a "recoupment" of the profits IBM gave up by limit pricing with FTP. (App. A at 16) The record was clear. FTP both *locked out* the PCMs and *locked in* a customer to its IBM CPU. Because IBM peripherals could not attach to non-IBM CPUs, a customer contractually bound to keep its peripherals under a two-year FTP lease was likewise bound, technologically, to keep the IBM CPU for that period. Such customers, once having signed an FTP lease, were powerless if IBM raised its CPU prices. IBM knew this — and exploited it by raising its CPU prices just two months after FTP was announced. IBM recouped the tens of millions of dollars it gave up in FTP with its CPU price increase. The net effect of FTP and the CPU increase was said to be a "wash" for purposes of "business volumes" (gross revenue per year). Customers quickly lost the short-term benefit of lower FTP prices. If anything, the net effect was to *increase* customers' overall costs. (PX 740-R)

it is the jury which "weighs the contradictory evidence and inferences" and draws "the ultimate conclusion as to the facts."

Continental Ore, 370 U.S. at 700, *quoting Tennant* v. *Peoria & P. U. Ry. Co.*, 321 U.S. 29, 35 (1943).

This Court vacated the judgment of the court of appeals and remanded to the district court for further proceedings.

CONCLUSION

For the reasons stated, the Court should grant Transamerica's petition for a writ of certiorari, reverse the judgment of the court below, and remand for trial under the appropriate substantive and evidentiary standards.

Respectfully submitted,

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